

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TODD A. CONOVER and DEPARTMENT OF THE AIR FORCE,
DAVIS MONTHAN AIR FORCE BASE, Ariz.

*Docket No. 96-2466; Submitted on the Record;
Issued December 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

In the present case, the Office has accepted that appellant, a plumber, sustained a lumbosacral strain and aggravation of consequential gastrointestinal bleeding due to medication resulting from a lifting injury which occurred on November 18, 1991. The Office terminated appellant's compensation benefits on October 4, 1994 on the grounds that the reports of the Office's second opinion physician, Dr. Richard Silver, a Board-certified orthopedic surgeon, established that appellant no longer had any residuals of the accepted employment-related injury. The Board reversed the Office's decision on February 5, 1996 on the grounds that appellant was not given due process notice of the proposed termination of compensation.¹ On March 5, 1996 the Office issued a proposed notice of termination of compensation wherein it informed appellant that the weight of the medical evidence of record established that any current disability was not causally related to the accepted employment-related injury. The Office terminated appellant's compensation benefits by decision dated May 6, 1996, on the grounds that the reports of Dr. Silver, an Office second opinion physician, constituted the weight of the medical evidence and established that appellant had no continued disability or need for medical care causally related to the accepted November 19, 1991 employment injury.

The Board finds that the Office did not meet its burden of proof to establish that appellant's employment-related disability had ceased after May 6, 1996. The Board finds that a conflict exists in the medical opinion evidence as to whether appellant continues to have residuals and disability causally related to the accepted employment injury.

The medical evidence of record substantiates that appellant sought continued medical treatment from Dr. Michael Couch, a general surgeon. He continued to note appellant's

¹ Docket No. 95-708 (issued February 5, 1996).

subjective symptoms of pain in his monthly evaluation reports. In a report dated December 23, 1993, Dr. Couch reported that appellant did not have any neurological deficits. He noted that appellant had persistent chronic back pain which did not seem to have been ameliorated by aggressive physical therapy or multiple modality treatments. Dr. Couch stated that appellant's employment injury had caused a 75 percent disability rating for his regular employment and that this rating should be finalized and appellant retrained for other employment. Dr. Couch also noted that appellant would discontinue use of his oral medication of ibuprofen, orudis or piroxican and would continue with Zantac to decrease his gastric upset. In a report dated May 17, 1994, Dr. Couch indicated that appellant seemed to be stable, but that his back pain was chronic and that it would be difficult for appellant to return to his regular employment due to loss of strength and flexibility during his years of disability.

In a report dated April 2, 1996, Dr. Couch reported that appellant had returned for follow-up of his chronic back pain and disability. He noted that appellant continued to complain of persistent and ongoing low back pain with occasional acute exacerbation of severe stiffness and pain, with a few periods of lack of symptoms; and with continued complaints of gastrointestinal upset and heartburn, the symptoms previously ascribed to his taking nonsteroidal anti-inflammatory medicine prescribed for his pain. Dr. Couch stated that appellant had chronic disability secondary to lumbosacral strain with clinical evidence of nerve root irritation. He concluded that appellant essentially was fully disabled with inability to function normally at his previous occupation. Dr. Couch, however, noted that while there was also a question of how much of appellant's condition was due to his automobile accidents that occurred near the time of his industrial injury he had previously testified for the auto insurance carriers that appellant's injuries did seem to be more significantly related temporally and functionally to his industrial injury. Finally, he again noted as he had in many of his earlier reports that appellant's case continued to be somewhat frustrating due to the fact that appellant was not showing much improvement despite multi-modality treatment.

On April 21, 1993 appellant was examined by an Office second opinion physician, Dr. Richard A. Silver. He stated that as a result of the employment injury of November 1991 appellant had sustained a cervical spine strain, which was mild and had resolved; a lumbodorsal musculotendinous strain, mild to moderate in nature and severity with paravertebral spasm and loss of range of motion; acute myofascial fibrositic reaction; sacrococcygeal contusion with probable fracture; and acute traumatic anxiety reaction, post-traumatic anxiety neurosis. Dr. Silver recommended that appellant discontinue his chiropractic care and undergo extensive diagnostic testing. He concluded that appellant was disabled from employment. Dr. Silver also noted that if the diagnostic testing was negative, appellant should undergo psychological evaluation for conversion hysteria, malingering or Munchausen syndrome. On May 27, 1993 Dr. Silver indicated that appellant's bone scan of April 26, 1993 was normal; magnetic resonance imaging (MRI) of April 27, 1993 was normal; and pelvic computerized tomography (CT) scan was also normal. He again indicated that appellant had elements of Munchausen syndrome, functional overlay, conversion hysteria or malingering. On June 10, 1993 Dr. Silver reported that appellant had a true normal musculoskeletal examination and that his subjective complaints were out of proportion to his objective findings. He again stated that he had suspicions of malingering, but indicated that appellant would have to be referred for psychiatric evaluation if deemed necessary to determine whether the malingering was conscious. On

June 14, 1993 Dr. Silver reported that appellant had postural thoracolumbar scoliosis, massive morbid obesity; and cervicolumbar syndrome. He concluded that appellant would be able to return to light-duty work on July 1, 1993, with return to full-duty work on or about September 1, 1993.

5 U.S.C. § 8123(a) provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

Essentially, a conflict exists in the medical opinion evidence because appellant's treating physician, Dr. Couch, continued to report through April 1996 that appellant had chronic back pain and lumbar sprain which was causally related to the employment injury. The record is replete with reports from Dr. Couch which indicate that up until the termination of appellant's compensation benefits in 1994 appellant sought almost monthly treatment from him. Dr. Couch always continued to report that appellant remained disabled due to his employment injury.

Dr. Silver, on the other hand, opined following extensive testing including MRI and CT scans, that there was no objective evidence to support the extent of appellant's subjective symptoms. Dr. Silver opined that appellant could return to light-duty work, to be followed two months later by a return to full-duty work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.²

As the Office did not resolve this conflict in the medical opinion evidence, as to whether appellant had residuals of the accepted employment injury causing disability, it did not meet its burden of proof in this case.

The Board also notes that the record contains psychiatric evaluations from Dr. Gabriel L. Cata. In a report dated January 4, 1993, he diagnosed alcohol abuse, adjustment disorder with depression mood, dramatization of depressive symptomatology consciously for possible gain of benefits and paranoid personality. Dr. Cata related that by history, there was neither alcohol abuse nor symptoms of depression prior to appellant's automobile accident of October 27, 1991 and his aggravation of injury by his employment injury of November 19, 1991. He stated that there was then an insidious build up of tension and aggression and loss of self-esteem that led appellant to drink to excess and to feel depression. He opined that appellant's employment injury was an aggravating factor of a process that was already in motion and accounted for 15 percent of appellant's dysfunction. Dr. Cata also noted that appellant's need to dramatize his symptoms of depression were caused by his basic feeling of insecurity as he came from a background of poverty and grew up in a home without a father figure. Therefore when appellant was injured and unable to earn as much money as before, he felt insecure and maximized his

² *Patricia A. Keller*, 45 ECAB 278 (1993).

symptoms to gain financial support and sympathy. He also submitted a supplemental report, essentially restating his earlier conclusions. He generally provided some evidence that appellant may have an adjustment disorder with depressed mood which was aggravated by his employment injury. He did not, however, provide the type of rationalized medical opinion necessary to ascertain whether this condition was causally related to the accepted employment injury or not. As both Dr. Couch and Dr. Silver have recommended psychiatric evaluation in this case, and as Dr. Cata did not fully resolve whether appellant had a psychiatric condition, causally related to his employment injury, the Office shall also further develop this aspect of the claim.

The decision of the Office of Worker's Compensation Programs dated May 9, 1996 is hereby reversed and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
December 22, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member